UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| JENNIFER S. BARD | : | Case No.: 1:17-cv-266 |
| Plaintiff, | : | Judge Michael R. Barrett |
| vs. | : | |
| UNIVERSITY OF CINCINNATI | : | **PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** |
| PETER F. LANDGREN | : | |
| Defendant. | : | |

Pursuant to FRCP 65(a) and (b), and as is more fully set forth herein, Plaintiff, Jennifer S. Bard, moves the Court to issue a preliminary injunction enjoining the Defendants from their continuing denial of Plaintiff's rights under the Fourteenth Amendment of the United States Constitution, for the reason that Plaintiff is suffering, and will continue to suffer, irreparable injury, and has no adequate remedy at law.

Respectfully submitted,

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# MEMORANDUM

## I. INTRODUCTION

Jennifer S. Bard ("Bard" or "Dean Bard") has been the Dean of the University of Cincinnati College of Law ("College of Law") since July 2015. On March 22, 2017, the Interim Provost, Peter Landgren ("Interim Provost" or "Landgren"), placed Dean Bard on Administrative Leave. He did so without any lawful or factual basis and contrary to UC's explicit policies. Dean Bard remains on Administrative Leave as of this filing. The Interim Provost's actions have denied Dean Bard significant liberty and property interests to which she is entitled as an employee of the State. Moreover, these actions were taken without even the most basic notice or right to be heard, as mandated by the Fourteenth Amendment. Based on these plainly unlawful actions, Dean Bard is likely to prevail on her constitutional claims.

Further, by improperly placing Bard on Administrative Leave -- in the context of an academic appointment – the Defendants have caused Bard (and continue to cause her) catastrophic and irreparable damage to her reputation and employment interests. This continuing irreparable harm can only halted by the Defendants' rescission of their unlawful placement of Bard on Administrative Leave, and her reinstatement to her prior status. This motion is brought for a Preliminary Injunction compelling Defendants to rescind her Administrative Leave and return her to the status she enjoyed prior to her placement on Administrative Leave.

## II. CRITICAL FACTS

The facts underlying Bard's complaint, and which form the basis for this motion, are set forth in detail in the Affidavit of Jennifer S. Bard, sworn to April 21, 2017, ("Bard Aff."), as well as the Affidavit of Professor Christo Lassiter, sworn to April 18, 2017. In the interest of judicial economy, only the facts most directly relevant to Defendants' denial of Dean Bard's Fourteenth Amendment rights are set forth herein

**The Events Preceding Bard's Administrative Leave**

The course of events which culminated in Dean Bard's unconstitutional Administrative Leave began in December 2016 (Bard Aff. ¶¶ 30-54). On December 6, 2016, the Interim Provost informed Dean Bard that a small group of faculty had advised him that they were unhappy with her administration and had enough support to issue a vote of "no confidence." The Interim Provost told her that the faculty had threatened that they would go to the press if she did not resign. (*Id.,* ¶ 30).

The Interim Provost described to Dean Bard the complaints of this small group. Many of the concerns reflected ordinary tensions between faculty and administration. Others were entirely self-serving, based on inaccurate information, or represented conclusions faculty had reached about conduct that was only anticipated. The Interim Provost, apparently ill-prepared to deal with the situation, did not want to discuss the facts underlying any of these specific concerns. Further, he was not interested in investigating the accuracy of these complaints. While he assured Dean Bard that none of the allegations were sufficient to justify her removal for cause, he told her that she had "lost her flock" and could not succeed as Dean. (*Id*., ¶¶ 31, 32).

Stunningly, with no more information than these uninvestigated complaints, the Interim Provost requested that Bard resign as Dean.

Bard was shocked at the Interim Provost's suggestion. The grievances by this small group of faculty were typical of faculty complaints about a new Dean. Moreover, this request, coming less than six months after she had received accolades and a bonus from the prior Provost for implementing the very measures which certain elements of the faculty now opposed, was entirely irrational. Additionally, Dean Bard was alarmed that the Interim Provost was so ill equipped to deal with this type of conflict and to recognize the self-serving nature of this small group of faculty. (*Id.*, ¶ 34).

Dean Bard refused to resign. However, she recognized that there were significant communication issues that needed to be addressed at the College and committed to take whatever steps were necessary. (*Id.,* ¶ 35). Thereafter, Dean Bard and the Interim Provost entered into a six-month agreement to restore communication. (*Id.* ¶ 36, Exh. 5). During this period they agreed to examine the faculty concerns and bring in a Mediator to facilitate communication with the goal of working to harmoniously resolve the conflicts.

Unfortunately, the Interim Provost subverted this agreement from the beginning, and demonstrated no effort to act in good faith to reach a resolution. Indeed, he attempted to use the agreement only as a method to acquire more information detrimental to Dean Bard, to prevent her from providing input into the process and to block mediated communication. Despite Bard's determined efforts to execute the 6 Month Plan and to bring in a Mediator, the Interim Provost refused as he was plainly looking for a means to force her resignation. (*Id.* ¶¶ 38- 49).

On March 19, 2017, the Cincinnati Business Courier ("CBC") published an article entitled "*University of Cincinnati law dean under fire from faculty."* The article was written based on materials CBC had acquired through an open records request. (*Id.,* ¶ 51). The materials produced to the CBC included emails among the faculty about Landgren's failure to fire Bard in December 2016 which a faculty members described as a "chicken-sh**" move. *(Id*., ¶ 70).

On March 20, 2017, Dean Bard wrote to the Interim Provost to express her deep concerns. She ended that email as follows: "No outside observer could fail to notice that

I am the first woman dean of the law school, and am being treated very differently than any previous dean of the law school, at UC. . . .” (*Id.,* ¶ 52).

In response to the CBC article, which was based on partial information, Dean Bard provided CBC with additional information about the underlying tensions at UC. The material she sent to CBC included an email she had sent to the Faculty that laid out her concerns and perspectives about the ongoing situation. (*Id*., ¶ 53).

On March 21, 2017, CBC published an article entitled “*UC law dean responds to calls for her ouster*.” The article revealed that the calls for Bard’s ouster resulted from faculty resistance to her tackling the college’s deficit. (*Id.,* ¶ 54).

Immediately following publication of the article – on March 22 -- the Interim Provost moved to shut Bard down entirely by placing her on Administrative Leave effective immediately. (*Id.,*¶ 55). The Interim Provost’s decision to place Dean Bard on Administrative Leave was wholly unjustifiable and there was no basis in law or fact for doing so. (*Id., Passim).*

Placing Bard on Administrative Leave was contrary to UC’s own internal policies. Pursuant to UC’s policies regarding Administrative Leave, there are only two types of Administrative Leave. (*Id.,* ¶ 58, Exh. 7). One is “Non Investigatory Administrative Leave” which is a voluntary leave requested by the employee. Bard clearly did not request this leave. The other is “Investigatory Administrative Leave” appropriate only when “an allegation of misconduct is made against an employee which, in the opinion of the appropriate Human Resources Department representative, requires that the employee be removed from the worksite in order to maintain the health, safety or welfare of that employee or others while the allegations against the employee are investigated.”

It is undisputed that Bard has engaged in no conduct that would warrant Administrative Leave. No allegation of misconduct of any kind has been filed with Human Resources against Bard, much less an allegation that would require removal to maintain the health, safety or welfare of an employee. Further, it is undisputed that there is no ongoing investigation (*Id.,* ¶¶ 5, 59, 60).

Moreover, in the meeting where the Interim Provost placed Bard on Administrative Leave he made clear his reason for taking the action, which reason does not support Administrative Leave. Landgren advised Bard that he was placing her on Administrative Leave because he believed she had lost the trust of the faculty. This trust was lost, he claimed, because, among other things, she had failed to follow through on her promise to bring in a Mediator – a promise that he had purposely frustrated. (Bard Affidavit ¶ 56). Further, Landgren's letter which formally placed her on Administrative Leave, stated that the reason for the leave was that the "trust" of a "group of faculty/librarians" had been "irreparably broken" and it was "no longer feasible for [her] to continue to serve in this role." (*Id.* ¶63, Exh. 1). Losing trust of the faculty is plainly not a basis for Administrative Leave under UC's policies.

Indeed, the faculty's loss of trust in Bard was the same criticism the Interim Provost made to Bard in December 2016 when he asked her to resign. However, in the three months between the threat of "No Confidence" and the date Bard was placed on Administrative Leave, she had continued to carry out all her duties and to represent the College of Law to students, faculty, alumni and donors. Obviously, if there had been any kind of misconduct that warranted Administrative Leave for "loss of trust", he would not have permitted her to continue in her Dean position for those three months.

Moreover, the University has ***plainly admitted*** that Bard engaged in no conduct that could warrant placing her on Administrative Leave. At a meeting the Interim Provost had with faculty on March 24, 2017, the Interim Provost explicitly stated that that Bard had done nothing "illegal", "immoral" or "unethical," that there were no "financial issues" and that there was no new allegation or smoking gun that caused him to place her Administrative Leave. (Affidavit of Christo Lassiter*, ¶ 5).* At worst what occurred is that a group of faculty expressed a preference for a new Dean. UC inappropriately responded to that preference by using a mechanism only available in cases of misconduct.

Finally, it is undisputed that UC is not conducting any investigation during this Administrative Leave period. There is simply nothing to investigate as no claims of wrongdoing have been made and no such conduct has occurred. "Investigatory Administrative Leave" without an investigation is a farce *and a de facto* firing, as there is no basis pursuant to which the leave will rationally end.

Despite the complete lack of any basis for placing Dean Bard on Administrative Leave, Bard's requests to the University to remove her from the Leave have been refused.

**Events Following Bard's Placement on Administrative Leave**

Bard was directed that during her leave she "should not perform any work on behalf of, or act as an agent for" the University. (Bard Aff., Exh. 1). Landgren further advised Bard that she would remain on Administrative Leave at least through April 28, 2017. She was instructed to do nothing other than work on an undefined plan for her "transition". Despite that Bard remains a full tenured professor, she is prohibited from doing any work whatsoever, including any efforts in her capacity as a Professor, including research, travel, class preparation and public presentations. (*Id.,* ¶ 64, Exh. 1).

Further, although Bard's Leave is paid with respect to her salary, there are numerous and significant financial benefits that she has lost. Specifically, the Dean position is associated with the Nippert Chair and all the financial benefits associated with it. The Nippert Professor of Law position provided Bard with financial resources to carry out research-related functions including travel to legal conferences to present and/or participate and to hire research assistants to help with research. These conferences and research are central to her work as a professor and to her reputation in the academic community. Losing access to the Nippert chair has required Bard to cancel scheduled conference engagements and to halt ongoing academic commitments. *(Id*., ¶ 70).

The College of Law has made no pretense of returning Bard to her position following the conclusion of her "Administrative Leave," whenever that may be. Indeed, Landgren transferred Bard's duties and responsibilities to Verna Williams, a faculty member who has been elevated to the title of Special Assistant to the Interim Provost. (*Id.* ¶ 4).

There is no ongoing investigation of any conduct that would inform a decision concerning the termination of her Administrative Leave. No one from the University has asked her to submit to an interview or to discuss with her any information with respect to her "transition." Bard has no information concerning what may or may not occur on April 28. She has been left to twist in the wind while her reputation is being destroyed.

**Bard's Reputation and Employment Prospects Suffer Daily**

It is well understood in higher education circles that, placing someone on "Administrative Leave" is a status strictly reserved for individuals who engage in immoral, illegal, unethical or criminal conduct. Bard Aff. ¶ 74. Indeed, that policy is expressly laid out in UC's policies for Investigatory Administrative Leave. (*Id.,* Exh. 7). The timing of Bard's leave – mid-semester – enforces that stigma by implying an urgency that does not exist here. It suggests the sudden discovery of an allegation that requires investigation, or, as in this case where there is no investigation, a discovery of misconduct so serious as to require immediate removal. (Id.,¶ 76).

Having been placed on Administrative Leave mid-Semester and stripped of her ability to serve the University, the public perception is that Dean Bard has engaged in conduct that would warrant such status, when indeed, no such conduct has occurred. This perception has been terribly damaging to her reputation and employment prospects. (*Id.,* ¶¶ 71-84).

After Bard's meeting with the Interim Provost in December 2016, she started to seek job opportunities outside of UC in the event the Plan was unsuccessful. She was a significant contender for three University positions. These Universities were not alarmed by the press concerning the tensions between Bard and the faculty over spending. (*Id.* ¶ 71). She was also working with a recruiting firm during this time, which firm, despite the press, encouraged her to apply for other law school deanships and administrative positions. If anything, Bard's willingness to engage with the law school faculty on this subject, rather than to capitulate their demands, was recognized as a positive trait in a leader. The personal correspondence she received from other law school deans and law faculty from all over the country was supportive. (*Id.,* ¶ 72).

However, when Bard was put on Administrative Leave, the public perception and support changed entirely. (*Id.,* ¶ 73**).**

All three potential employers, who had been supportive, expressed concern that the “Administrative Leave” might, as one clearly stated “imply misconduct.” (*Id.,* ¶ 75).

On academic social media sites, speculation about Bard’s conduct is disturbing. TaxProf Blog is widely read in legal academe and has followed the story closely. (*Id.,* ¶¶ 77 - 83). On March 23, 2017 it posted the following headline *Provost-Removes Cincinnati-Law-SchoolDean-Less-Than-Two-Years-Into-Her-Five-Year-Term* http://taxprof.typepad.com/taxprof_blog/2017/03/-provost-removes-cincinnati-law-school-dean-less-than-two-years-into-her-five-year-term.html. (*Id.,* ¶ 78**).**

In comments to theTaxProf Blog, some from anonymous sources and some from legal academics, the speculation began immediately:

One comment read: “So much for the 6 month plan. Didn't even last 6 days. Law schools blow all this smoke about mediation and compromise, but they are the absolute worst at it. Even the most miniscule problems escalate to the highest extreme. *Perhaps Dean Bard did something truly alarming that we didn't know about,* but I am willing to bet this was just about faculty discontent over very necessary budget cuts. In fact, I bet the faculty were pissed that she wasn't raising tuition to the level of peer schools before resorting to budget cuts.” Posted by: JM | Mar 23, 2017 6:14:02 AM (*Id., 7*9).

Another comment, posted by Professor Eric Rasmusen, read: “*Mid-semester! I thought that didn't happen unless a dean was indicted. Maybe that will be tomorrow's announcement.”* (*Id.,* ¶79**).**

Another comment, in response to a blog located at https://pjmedia.com/ instapundit/?s=Bard with the title THESE ARE TOUGH TIMES FOR DEANS: University of Cincinnati law dean under fire from faculty, stated “As a rule, the faculty contingent that wants no reduction in its privileges and benefits will be 100% of the faculty. *But this is not unknown, there must be something else going on.” (Id.,* ¶80*).*

In a blog entitled Lawyers, Guns & Money http://www.lawyersgunsmoneyblog.com /2017/03/jennifer-bard-fired-university-ci/, the speculation continued: Firing a dean who isn't even two years into a five-year contract is extremely unusual, at least in the law school world, *and usually only happens in the wake of some sort genuine scandal*” and “*Who knows what the whole story is* here, but it's worth mentioning that this wouldn't be the first time that a woman was elevated to this type of leadership position and then fired shortly thereafter because of what, on their surface at least, seem like complaints that are as petty as they are predictable. (Travel receipts???).” (*Id.,* ¶ 81).

Bard's friends and colleagues in the academic world consistently express the view that, although they know otherwise, her being placed on Administrative Leave casts a pall suggesting that “they don't know the whole story.” (*Id.,* ¶ 82).

In a blog located at http://taxprof.typepad.com/taxprof_blog/2017/04/ titled ex-cincinnati-law-dean-claims-her-removal-was-improper-faculty-unwilling-to-put-student-needs-ahead-.html the headline read “Ex-Cincinnati Law Dean Challenges Her Removal: Faculty Unwilling TO Put Students Need Ahead of their Own” is Not Adequate Ground. *But is There More To The Story?”* (*Id.,* ¶ 83).

This speculation and innuendo causes reputational damage to Bard every day and wholly interferes with her ability to obtain employment.

**Bard Has Been *De Facto* Fired**

Although Bard technically retains the Dean title while on paid Administrative Leave, she has been removed and barred from her deanship, replaced by another and placed under a cloud of suspicion without a scintilla of due process. Her status is tantamount to a firing and the economic damages, despite receiving her salary, have been substantial.

Bard has been stripped of all authority. The direction from the Interim Provost prevents her from not only acting in her capacity as Dean, but also from acting in any fashion as a tenured faculty member though she retains her position as a tenured Professor. Still, she has been barred from engaging in any activity whatsoever including researching, writing, publishing, presenting or meeting with students.

Bard's duties and responsibilities have been fully reassigned to Verna Williams. While Ms. Williams has not been given the title of Dean, there is no role or place for Bard at the College of Law.

The public perception is that Bard has been fired. The media has consistently portrayed the Administrative Leave as a firing which has contributed to Bard's reputational damage. See for example, *Cincinnati Law Dean Gets the Boot*, http://www.law.com/sites/almstaff/2017/03/23/cincinnati-law-sacks-dean/. (Bard Aff. ¶ 77).

Adding to the conclusion this Administrative Leave is tantamount to firing is the fact that the period of Administrative Leave is simply an arbitrary period of time that will inevitably culminate in her termination. There is no investigation being conducted or any sort of information gathering that could alter whether or not she will be returned to the

Deanship. It is simply a waiting period during which her status is entirely unclear and her reputation is pummeled daily.

Finally and significantly, although Dean Bard remains a tenured faculty member, she is facing a significant financial loss that will occur as soon as her Administrative Leave ends, assuming she is terminated. Assuming the leave ends any time prior to the Fall of 2017, when she will resume her teaching duties and will begin to collect a salary, she will have no income from UC. In other words, once the leave ends and she is formally removed as Dean, she will have no salary whatsoever, because she has no active faculty position while Dean. She will not begin to receive a salary again until she resumes faculty responsibilities in the fall semester for which she will be paid. (Bard Affidavit ¶ 6).

Bard is in an impossible Catch-22. The longer she stays on Administrative Leave, the longer she suffers extreme reputational harm with attendant employment consequences. On the other hand, the sooner she is removed from Academic Leave, and officially fired as Dean, the sooner she finds herself without any income.

Bard has suffered enormous reputational damage as a result of having been improperly placed on Administrative Leave and will continue to suffer these damages until the Administrative Leave is rescinded and it is judicially determined that Administrative Leave was inappropriate.

## III. ARGUMENT

### A. RULE 65 STANDARDS

Four factors are balanced in determining whether to grant a preliminary injunction:

1. Whether the moving party has shown a strong likelihood of success on the merits;

2. Whether the moving party will suffer irreparable harm if the injunction is not issued;

3. Whether the issuance of the injunction would cause substantial harm to others; and

4. Whether the public interest would be served by issuing the injunction.

*Overstreet v. Lexington-Fayette Urban Cnty. Gov't*., 305 F.3d 566, 573 (6th Cir. 2002). These four considerations are factors to be balanced, not prerequisites that must be met. *McPherson v. Mich. High Sch. Athletic Ass'n., Inc.*, 119 F.3d 453, 459 (6th Cir. 1997). The four enumerated factors guide the discretion of the court and are not meant to be rigid or unbending, which would be contrary to equity jurisprudence. *In re Eagle-Picher Industries, Inc.,* 963 F.2d 855, 859 (6th Cir. 1992*).* However, where "a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001). Accordingly, in a case where constitutional rights are at issue, the court should begin its inquiry with determining whether the movant shows a substantial likelihood of success on the merits.

As demonstrated in the recitation of critical facts, Dean Bard's likelihood of success on the merits and the existence of irreparable harm from the denial of her constitutional rights, are plain from the undisputed facts.

**B. PLAINTIFF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF HER FOURTEENTH AMENDMENT CLAIMS**.

Application of the Fourteenth Amendment's due process clause requires that a public employee not be deprived of liberty or property by her State employer without notice and the opportunity to be heard in a formal process that protects the employee from arbitrary and unsubstantiated denial of those rights. As the Sixth Circuit has stated:

> Procedural due process protects those life, liberty, or property interests that fall within the Due Process Clause of the Fourteenth Amendment. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" *Board of Regents of State Colls. v. Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). [**41] Liberty interests include "the right of the individual to contract, engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the ordinary pursuit of happiness by free men." *Id*. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)). In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest. *See Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999).

*Women's Medical Professional Corporation v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006). *Accord*, *Ragozzine v. Youngstown State Univ*., 2 F. Supp. 3d 1051, 1071 (N.D. Ohio 2014), aff'd, 783 F.3d 1077 (6th Cir. 2015)("Procedural due process prevents arbitrary exercises of government authority without the opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542–543, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Further, some form of due process, in the form of a prior hearing, is required when there is a protected property or liberty interest. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 569–570, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). See *Gunasekera v. Irwin,* 551 F.3d 461, 467 (6th Cir. 2009) ("To prevail on the claim that he was unconstitutionally deprived of his property when his Graduate Faculty status was suspended, Gunasekera must " 'establish three elements; (1) that [he] ha[s] a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment ..., (2) that [he] w[as] deprived of this protected interest within the meaning of the Due Process Clause, and (3) that the state did not afford [him] adequate procedural rights prior to depriving [him] of [his] protected interest.")(citations omitted).

Here, Dean Bard can plainly establish that (1) by virtue of her contract and the University's own rules and regulations, she has a property interest in continuing to serve as the Dean and a tenured faculty member of the College of Law, (2) she also has a liberty interest in not being reputationally stigmatized by the University in connection with her employment, (3) Defendants have deprived her of those property and liberty interests rights by placing her on Administrative Leave and thereby stripping her of all of her duties and responsibilities, and (4) that in depriving her of these interests the University afforded her no process at all, let alone process sufficient under law. Accordingly, Bard plainly can establish a likelihood of success on the merits.

### 1. Bard Has Well-Recognized Property Interests in Serving as Dean and as a Tenured Faculty Member

There is no question that Bard has a property interest in her employment as Dean, in the Nippert Chair, and in her tenured faculty position. Indeed, the United States Supreme Court has expressly recognized that a tenured public college professor, or even just a professor with an employment contract or an implied promise of continued employment, possesses a cognizable property interest under the due process clause:

> Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, and college professors and staff members dismissed during the terms of their contracts, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment.

*Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576–77, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972)(citations omitted).

Here, Bard has a five year employment contract to serve as Dean, which contract also establishes her right to a tenured faculty position and the benefits of the Nippert Chair. *See* Bard Aff. ¶ 13. Moreover, she is protected by the University's policies and procedures, which are both publicly available and incorporated by reference into her employment contract. *Id.* at ¶ 58, Exh. 7. Of course, these policies and procedures include the right *not* to be placed on Administrative Leave unless the criteria for such action are met. *Id.* Under these facts, Bard unquestionably possesses a property interest in her service as Dean and a tenured faculty member. *See also Gunasekera v. Irwin, 551 F.3d at 468* (denying motion to dismiss because even in the absence of a contract, plaintiff could establish a property interest in his Graduate Faculty Status by showing University custom and practice); *Gunasekera v. Irwin*, 748 F. Supp. 2d 816, 820–24 (S.D. Ohio 2010)(after remand from the Sixth Circuit's decision noted above, and on summary judgment, finding that plaintiff had in fact established a protectable property interest in his Graduate Faculty Status, based on University custom and practice).

### 2. Bard Also Has a Liberty Interest In Being Protected From Stigmatizing Government Action

In addition to possessing a property interest in serving as Dean and a tenured faculty member, Bard also has established a liberty interest in being free from unjustified and stigmatizing Government conduct. As the Sixth Circuit has stated:

> [A] person's reputation, good name, honor, and integrity are among the liberty interests protected by the due process clause of the fourteenth amendment." Chilingirian v. Boris, 882 F.2d 200, 205 (6th Cir. 1989) (citing Roth, 408 U.S. at 573). To establish a deprivation of a protected liberty interest in the employment context, a plaintiff must demonstrate stigmatizing governmental action that so negatively affects his or her reputation that it [**15] effectively forecloses the opportunity to practice a chosen profession. See Roth, 408 U.S. at 573-74. "When a state fires an employee for state reasons likely to make him all but unemployable in the

> future, by marking him as one who lost his job because of dishonesty or other job-related moral turpitude, the consequences are so nearly those of formally excluding him from his occupation that the law treats the state's action the same way, and insists that due process be provided." *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136, 1138 (7th Cir. 1984) (Posner, J.); see also *Joelson v. United States*, 86 F.3d 1413, 1420 (6th Cir. 1996); see generally *Codd v. Velger*, 429 U.S. 624, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1997).

*Lisle v. Metropolitan Government of Nashville and Davidson County Tennessee*, 73 Fed. Appx. 782; 2000 U.S. App. LEXIS 13955 (6th Cir. 2003). *Accord, Gunasekera v. Irwin, 551 F.3d at 469 (*infringement of liberty interest adequately alleged where professor was publicly accused of plagiarism upon being suspended).

### 3. By Placing Bard on Administrative Leave the University Has Infringed Upon Her Property and Liberty Interests

By placing Bard on Administrative Leave, the Defendants have plainly deprived her of the property and liberty interests set forth above. As to her property interests, Bard has been denied the right to her contractually protected duties and benefits as Dean, as the Nippert Chair, or as a tenured faculty member. She has also been denied the right, guaranteed by her contract and the University's rules and policies, *not* to be placed on Administrative Leave in the absence of a pending investigation as to specified alleged wrongdoing. Indeed, although she continues to be paid while on Administrative Leave, she may not "perform any work on behalf of, or act as an agent for, the University of Cincinnati." Bard Aff., Exh. 1. Consequently, she cannot teach, write, engage with students, or otherwise conduct the normal duties of a law school Dean or a tenured faculty member. Nor can she derive any benefits from the Nippert Chair. Her position and all its authority have been stripped from her. Her *de facto* replacement occupies her job responsibilities and wields her powers. She has been told to plan a "transition" to an unknown future. In short, she has been deprived of all of the benefits of her employment, with the exception of her salary. Such conduct is plainly sufficient to establish a *de facto* termination, and hence a deprivation of property under the due process clause.

Moreover, to the extent that Defendants seek to argue that Bard's constitutional claim cannot survive because being on paid leave does not constitute a deprivation of her property rights, that argument would be incorrect. While it is true that the Sixth Circuit held in *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004), that being placed on paid leave during the pendency of a valid investigation does not constitute adverse employment action, the Circuit Court has been clear that this holding *does not* apply to *de facto* terminations where, as here, an employee "an employee is suspended for a purpose other than to allow his employer to conduct a timely internal investigation into his alleged wrongdoing." *Thompson v. Quorum Health Resources, LLC,* 485 Fed. Appx. 783, 2012 U.S. App. LEXIS 1295 at **25 (6th Cir. 2012). *See also Kulick v Ethicon,* 803 F.Supp. 3d 781, 786 (S.D. Oh. 2011). In *Thompson*, the Court found that the plaintiff's "suspension preceding termination was essentially a *de facto* termination." 783 Fed. Appx. at 792. Of course, the same conclusion – that Bard has been subjected to a *de facto* termination by being placed on Administrative Leave with no investigation or process in place -- is fully applicable under the facts presented here.

Moreover, the manner in which the deprivation was effected served also to deprive Bard of her liberty interests. Specifically, it was publicly announced that she had been placed on "Administrative Leave." Under UC's own guidelines, the University may only place an employee on Administrative Leave when "an allegation of misconduct is made against the employee which . . . requires that the employee be removed from the worksite in order to maintain the health, safety or welfare of the employee or other while the allegations against the employee are investigated." See Administrative Leave Policy, Exh.7 to Bard Aff. Thus, the mere announcement of this action plainly communicated to the public that Bard was, at a minimum, under investigation for conduct that endangered the health, safety or welfare of another. The stigmatizing effect of this implicit accusation – which no one has in fact made -- has been devastating to Bard, as explained in her affidavit. Indeed, the cloud that it has caused has effectively precluded her from finding alternative employment. In short, Bard has plainly established that she has been deprived of her constitutionally protected liberty interest in avoiding devastating reputational harm and stigmatization.

**4. UC Provided No Procedural Rights to Bard, Before or After Placing Her on Administrative Leave**

It is undisputed that Dean Bard has been given no notice of her alleged failings, and no opportunity to be heard. No investigation is on-going, and no hearing has been set. She simply has had her career devastated by the Interim Provost and UC without any process whatsoever – either before or after the fact. This conduct on the part of the University is nothing short of egregious.

## C. DEAN BARD HAS NO ADEQUATE REMEDY AT LAW.

As noted above, in the context of Constitutional Rights, a plaintiff's establishment of a substantial likelihood of success mandates a finding of irreparable harm. *Bonell v. Lorenzo, supra*. Independent of that doctrine, a plaintiff suffers irreparable harm if the harm is not fully compensable by monetary damages. *Overstreet v. Lexington-Fayette Urban County Government*, 305 F3d 566, 578 (2002). Bard's grievous reputational damage and consequent career damages and inability to obtain employment while she remains under a cloud of suspicion is plainly not compensable by money damages.

Indeed, there is virtually no amount of money that can provide any complete relief or compensation for the damage Bard suffers. One's reputation and career do not have a price. Whether from malice or sheer incompetence, the Interim Provost and UC dealt with a wholly unsupported challenge to Dean Bard's leadership in a manner most likely to inflict the maximum damage to her reputation and career. Only the court's exercise of its equity powers can halt and begin to repair the damage to her.

**D. ISSUANCE OF THE INJUNCTION WILL NOT CAUSE ANY HARM**

An injunction that removes Bard from Administrative Leave and returns her to the Deanship and her faculty position will not cause any harm to Defendants. Defendants are not conducting any sort of investigation into any allegations that would be impeded by granting the injunction. Moreover, since it is plain that there was no basis for the Administrative Leave in the first instance, removing her from leave will surely not jeopardize the health, safety or welfare of any employee. Indeed, the only effect of issuing the Injunction will be to do justice. Moreover, the harm to Bard of her remaining on Administrative Leave without basis outweighs any harm that might come to Defendants by granting the Injunction.

**E. THE PUBLIC WILL BE SERVED BY THE ISSUANCE OF AN INJUNCTION**

Where a party, and particularly a state institution, abuses its power and acts improperly, with the effect of impairing an individual's constitutional rights and inflicting serious reputational and career harm, the public is served by the Court's intervention to prevent such further abuse. The public is served by the Court requiring Defendants to follow their own policies and procedures, requiring Defendants to honor its contracts and preventing the further abuse of power. See *Mick v. Level Propane Gasses, Inc.*, 168 F. Supp. 2d 804, 814 (S.D. Ohio).

Respectfully submitted,

/s/ R. Gary Winters
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## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, a copy of the foregoing document was filed electronically. I further certify that this Motion and all other documents filed in this action have been served by email upon Lori Ross, General Counsel of the University of Cincinnati at rossla@ucmail.uc.edu.

/s/ R. Gary Winters
R. Gary Winters (0018680)